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NO. 88-1791

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JANET D. VAUGHN
and
RICHARD L. VAUGHN,

Petitioners,

vs.

ADELINE SPEAKER
and
JANET E. PRESCOTT,
Co-Executors of
the Estate of
WILBUR P. SPEAKER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

Petitioner presents the following questions:

1. Whether the failure of the estate to provide actual notice to a person with a known cause of action against the decedent's estate, deprives that person of due process mandated by the Fourteenth Amendment to the United States Constitution.

2. Whether or not Ill. Rev. Stat. 1987, ch. 110, ¶13-209; Ill. Rev. Stat. 1987, ch. 110 1/2, ¶18-12; and Ill. Rev. Stat. ch. 110 1/2, ¶18-3 are unconstitutional to the extent they do not require actual notice be given to a claimant resulting in a time bar of his claim.

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OFFICIAL REPORTS OF OPINION BELOW

(a) The Supreme Court opinion is unprinted as yet and appears in Appendix A.

(b) The opinion of the Appellate

Court is to be found in 156 Ill.App.3d 962, 507 N.E.2d 1084 (1987).

(c) Gibbs v. Estate of Dolin, 146 Ill.App.3d, 496 N.E.2d 1126 (1986).

JURISDICTIONAL STATEMENT

To: The Honorable Justices
of the Supreme Court
of the United States

Judgment of the Supreme Court of Illinois was entered December 21, 1988, thereby affirming a judgment of the Illinois Appellate Court, Second District, 156 Ill.App.3d 962, 109 Ill.Dec. 245, 509 N.E.2d 1084 (1987). A timely Petition for Rehearing was denied by the Supreme Court on January 30, 1989.

Following the adverse decision from the Appellate Court, the Supreme Court of Illinois, under its Rule 315, granted appellant's Petition for Leave to Appeal on December 22, 1987. Briefing was com-

pleted by appellant on February 23, 1988. Oral argument was heard before the Supreme Court at its May term on May 24, 1988.

The law in Illinois at that time rejected the due process challenge to the publication provisions of a non-claim statute. Gibbs v. Estate of Dolin, 146 Ill. App.3d 203, 496 N.E.2d 1126 (1986), leave to appeal denied by the Supreme Court of Illinois.

After this case had been briefed in the Supreme Court of Illinois, this Court's decision in Tulsa Professional Collection Services, Inc., 485 U.S. ____, 99 L.Ed.2d 565, 108 S.Ct. ____ (1988), was published in which the law of Illinois as pronounced in Gibbs was reversed.

The opinion of the Supreme Court of Illinois in this case, filed on December 21, 1988, placed the burden of discovering the death of the tortfeasor on the

claimant. The court said:

> Although we need not determine whether, had the insurance company been timely notified of Speaker's death, it would have had a duty to so inform plaintiffs, we decline to impose any affirmative duty on an insurance company to monitor the status of its insured and notify claimants of the insured's death. Nor did the appellate court invoke such affirmative duty in finding an arguable basis for estoppel. The court noted in defendant's argument that the detriment was not due to a delay in filing suit because it was filed before the limitations period elapsed, but to a failure to ascertain before filing suit the defendant had died.

Appendix A, p. 10. (Emphasis added). The court also noted:

> We must leave it to the trier of fact to decide whether reasonable prudence dictated an attempt at verification that Speaker was alive. . . . The trier of fact may find that that plaintiffs carelessly failed to check the public records . . ..

Appendix A, p. 13. (Emphasis added.)

Thereupon, appellant promptly filed a

Petition for Rehearing in the Illinois Supreme Court.

The opinion of the Illinois Supreme Court is in sharp contrast to the notice requirement that Tulsa affirmed was necessary to satisfy due process and, instead, placed the responsibility for discovery on the claimant. Appellant in its Petition for Rehearing claimed the ruling of the Illinois Supreme Court deprived appellant of a protected property right without notice in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Appellant also claimed that Ill. Rev. Stat. ch. 110 1/2, ¶18-12 (1985) and Ill. Rev. Stat. ch. 110, ¶13-209 (1985), and by implication the publication provisions of the non-claim statute, Ill. Rev. Stat. ch. 110 1/2, ¶18-3 (1985), were unconstitu-

tional to the extent that they deprived appellant of actual notice. Appellant cited the opinion of this court in Tulsa and, as a matter of fact, appended to the Petition for Rehearing a copy of that opinion as published in 99 L.Ed.2d 565 (1988). The Supreme Court of Illinois denied appellant's Petition for Rehearing without opinion.

The law of the land as declared by this Court in Tulsa, in contrast to the existing law of the State of Illinois, did not become evident until after the briefing and argument of this case before the Supreme Court of Illinois. The federal question was consequently raised by appellant at the first opportunity and presented to the Supreme Court of Illinois in the Petition for Rehearing. It is suggested this satisfies the responsibility to raise the federal question in

the state court and at the first opportunity. The state court's failure to produce a written opinion is not a bar to the jurisdiction of this court which is sought under 28 U.S.C. §1257(3).

TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws.

Ill. Rev. Stat. ch. 110, ¶13-209 (1983):

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his or her representatives before the expiration of that time, or within one year from his or her death whichever date is the later. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, an action may be commenced against his or her executors or administrators after the expiration of the time limited for the commencement of the action, and within 6 months after the issuing of letters of office.

Ill. Rev. Stat. ch. 110 1/2, ¶18-12 (1985):

Limitations on payment of claims. (a) All claims against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, not filed within the representative or the court within 6 months after the entry of the original order directing issuance of letters of office are barred as to all of the decedent's estate, unless notice is not published as provided in subsection (a) of Section 18-3 but is published as provided in subsection (b) of Section 18-3, in which event all claims not filed within 6 months after the first publication date are barred as to all of the decedents' estate; but this Section does not bar actions to establish liability of the decedent to the extent the estate is

protected by liability insurance. (b) Unless sooner barred under subsection (a) of this Section, all claims barrable under this Section are, in any event, barred unless letters of office are issued upon the estate of the decedent within 3 years after decedent's death.

Ill. Rev. Stat. ch. 110 1/2, ¶18-3 (1985):

It is the duty of the representative to publish once each week for 3 successive weeks, commencing within 14 days after the issuance of letters of office, a notice informing all persons of the death of the decedent, the date of issuance of the letters, the name and address of the representative and of his attorney of record and that claims may be filed within 6 months from the date of issuance of the letters and that any claim not filed within that period is barred.

STATEMENT

Wilbur P. Speaker was negligent in causing an automobile accident on December 2, 1983 in which Janet Vaughn was injured. Janet Vaughn sought legal counsel with an attorney who began negotiations with the insurance liability carrier of Speaker. Negotiations continued until the parties were unable to reach a settlement. Vaughn's attorney filed suit on November 27, 1985 within the two-year statute of limitations period in Illinois. (Ill. Rev. Stat. ch. 110, ¶13-202 (1987)). The summons was returned eight days later on December 5, 1985 showing that Wilbur P. Speaker was deceased. Wilbur P. Speaker had died testate on January 16, 1985. A petition to have his Will admitted to probate was filed in the Probate Court for Whiteside County, Illinois as required by

Ill. Rev. Stat. ch. 110 1/2 ¶6-2 (1985). Letters Testamentary were duly issued in accordance with Ill. Rev. Stat. ch. 110, ¶6-8 (1985), to Adeline Speaker, wife of the deceased, and Janet Prescott as co-executors on February 13, 1985.

Publication of notice for claims ensued which barred claims not filed within six months. (Ill. Rev. Stat. ch. 110 1/2, ¶¶18-3, 18-12 (1985)).

Ill. Rev. Stat. ch. 110, ¶13-209 (1983) provided that if a person against whom an action might be brought dies before the statute of limitations expires for such claim, the action may be brought after the expiration of the time limit for such action "and within six months of the issuance of letters of office."

Vaughn filed a motion to substitute the co-executors as party defendants which was allowed by the trial court. Appel-

lant's complaint was thereafter dismissed on motion of the respondent on grounds the initial complaint was a nullity, and the amended complaint having been filed after the statute of limitations had run could not relate back. An appeal ensued.

The Appellate Court of Illinois, Third District, affirmed the trial court on this critical issue that the amended complaint could not relate back, but remanded to determine whether the respondant was estopped to raise the defense by reason of the continued negotiations of the deceased's insurance company with Vaughn's counsel after the tortfeasor's death. Counsel for Vaughn filed an affidavit stating he did not know of Speaker's death until the summons was returned. A representative of the deceased's insurance company also filed an affidavit that it did not have knowledge of Speaker's death.

After granting leave to appeal, the Illinois Supreme Court affirmed the appellate court on December 21, 1988. A Petition for Rehearing was filed by appellant which was denied by the Illinois Supreme Court without opinion on January 30, 1989.

How Federal Question Was Raised

This Court's opinion in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. ____, 99 L.Ed2d 585, 108 S.Ct. ___ (1988), had not been published when this case was briefed before the Supreme Court of Illinois. Consequently, the federal question was raised on Petition for Rehearing asserting that petitioner had been deprived of due process. See Judisdictional Statement for a full explanation. (pp. 2-8).

SUMMARY OF ARGUMENT

This court through the years has clung persistently to the historic precept that notice is a fundamental requirement of due process. Most recently, in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. ___, 99 L.Ed.2d 565, 108 S.Ct.__ (1988), that principle was rather emphatically reiterated. H. Everett Pope, Jr. had died testate while a patient in St. John Medical Center, Inc. His estate was subsequently opened. Publication was made for claims. Although it was aware of Pope's death, neither the creditor-hospital nor its agent, Tulsa Collection, filed a claim within the two month time period prescribed by Oklahoma statute. This Court found state involvement sufficient to implicate the Due Process Clause of the Fourteenth Amendment, and found the claimant had been denied that

required protection.

A parallel of the unfortunate predicament in which the creditor in Tulsa found itself is likewise duplicated in the unfortunate predicament in the case at bar.

Various statutory methods throughout the United States have been devised for dealing with the problem. All the statutory methods, however, have of necessity a common element present in the form of a probate proceeding. (See, e.g., Ill. Rev. Stat. ch. 110, ¶13-209 (1983); ch. 110 1/2, ¶18-12 (1985); ch. 110 1/2, ¶18-3 (1985)). Neither the Illinois statute, nor other state statutes noted in the appendix dealing with the subject matter require any notice other than by way of publication, and indeed most require no notice at all.

The statutes seem to fall into two

general categories. In both of those categories, knowledge of the death of the tortfeasor is obtained by the claimant when he stumbles onto that fact either by continuous surveillance and investigation, or when he files suit and the summons is returned indicating the death of the tort-feasor.

In one category, an estate has not been opened for the deceased. Certain time limitations are provided, usually which extend beyond the statute of limitation period, which provide the claimant with the opportunity upon his discovery of the tortfeaasor's death, to take such action as may be appropriate to open an estate for the decedent, thus enabling him to either file his suit so as to name an executor or an administrator as the defendant, or to amend an existing complaint to accomplish that objective.

The other group is one in which the estate of the tortfeasor has already been opened. In those statutes, there are likewise time limitations imposed either from the date the letters of office are issued, which is usually six months thereafter, or the time limitations imposed in the publication notice for claims.

Without exception, the statutes impose upon the claimant the burden of ascertaining whether or not the tortfeasor is still living either by seeing a publication notice, checking the public records, or utilizing other methods of making that determination.

Thus, one possessing a right of action against a deceased tortfeasor for personal injury is utterly dependent upon the probate procedure and its notice requirements

in the state where the accident occurred in order to protect his property interest. In our mobile society, that may very well occur in a state which is a significant distance from the home state of the claimant. Where the claim is being handled by a law firm as agent for the claimant, much as Tulsa Collection acted for St. John Medical Center, it makes surveillance as a practical matter virtually impossible. That difficulty is magnified when the attorney is dealing with the tortfeasor's insurance company or lawyer, and is ethically barred from contact with the tortfeasor.

It is evident in the circumstance at hand that the constitutional prerequisite of adequate notice is totally lacking. The statutes in question do not demonstrate a scintilla of compliance with the requirements of due process as dictated by

the Fourteenth Amendment to the United States Constitution. Consequently, the decision here should merely constitute a correlary to the decision in Tulsa Professional Collection Services, Inc. v. Pope.

ARGUMENT

TIMELY NOTICE BY MAIL OR OTHER MEANS SUFFICIENT TO INSURE ACTUAL NOTICE TO ONE POSSESSING A KNOWN CAUSE OF ACTION IS A PREREQUESITE OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. ____, 99 L.Ed.2d 585, 108 S.Ct. ____ (1988), confirmed the holdings in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and Mennonite Board of Missions v. Adams, 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706 (1983), that notice is a fundamental requirement of due process and that a protected pro-

perty interest cannot be divested solely through notice by publication. The dissent in Mennonite, 462 U.S. at 802, pointedly articulated that its majority opinion established a very broad principle, stating:

> Without knowing what state an individual interest will be at stake in future cases [the majority] espouses a general principle austensibly applicable whenever any legally protected property interest may be adversely affected.

Following a thorough analysis of construtive notice cases, and a careful review of the various non-claim statutes, this Court in Tulsa established that the State involvement "with the non-claim statute is substantial enough to implicate the Due Process Clause." 485 U.S. __, 99 L.Ed.2d at 576, 108 S.Ct. ___.

The question here presented is whether or not the requirement of actual notice as

a requirement of due process as espoused in Tulsa is to be applied in protection of those who possess a known cause of action against a decedent.

It appears rather academic that a cause of action constitutes a protected property interest in light of the expansive definition of that term as published in Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982), and reaffirmed in Tulsa.

It further seems axiomatic that no realistic distinction can be drawn between a "claim" and a cause of action for personal injury or death. Consequently, it does not seem presumptious to conclude that the latter is equally entitled to the notice as prescribed in Tulsa in order to satisfy the Due Process Clause.

STATE STATUTES

The same policy considerations that

prompted the conclusion in Tulsa that state action was involved are of equal application here. A common denominator is that the death of a debtor or tortfeasor, as the case may be, precipitates a distinct pleading or claim problem for the claimant. Consequently, all of the applicable statutes provide reference to probate proceedings. Such statutes are themselves actually non-claim statutes because in each instance the time bar is dependent upon the commencement and procedure of the probate proceedings.

Such state statutes fall generally into two categories. As to both categories, some of the statutes refer specifically to one possessing a cause of action for injury or death, and some refer to anyone possessing any type of a cause of action. (E.g., Illinois). The first category is one in which an estate

has not been opened for the deceased. Such statutes provide that if the statute of limitations had not expired at the time the decedent died, then there is an extension of time beyond the statute of limitations in which the claimant will have the opportunity to take the appropriate steps to open an estate for the decedent and filed his complaint. (See Statutes enumerated in Appendix C.)

In the second category an estate has already been opened. Two general methods are provided for by the various state statutes in dealing with that event. The first is that a time limit is provided for filing the complaint from the date the letters of office were issued. (See, e.g. Ill. Rev. Stat. ch. 110, ¶13-209 (1983) (Appendix D). None of the statutes require actual notice to the claimant but include by implication the provisions for

notice by publication. (See, e.g., Ill. Rev. Stat. ch. 110 1/2, ¶18-12 (1985) p. 9.) The second general method requires compliance with the notice of publication for claims in order to perfect the claim, which provides that any tort claim is forever barred unless it is brought within the time for allowance of claims. (See, e.g., N.C. Gen. Stat. §1-22, Appendix E).

State Decisions

The opinion of the Illinois Supreme Court in the instant case in depriving appellant of a protected property interest is typical of the majority rule in the United States. The Illinois court, noting that an estate had been opened for Wilbur Speaker with letters of office issued on February 13, 1985, ten months before the complaint was filed, ruled that appellant's claim was time barred under the provisions of Ill. Rev. Stat. ch. 110 1/2,

¶13-209 (1983). (Appendix A, p. 3). That statute required that the complaint be filed within six months of the issuance of letters of office. The only notice available to appellant was that of publication for claims (Ill. Rev. Stat. ch. 110 1/2, ¶18-12 (1985)) which under existing Illinois law did not violate due process. Gibbs v. Estate of Dolin, 146 Ill.App.3d 203, 496 N.E.2d 1126 (1986), petition for leave to appeal denied by the Supreme Court of Illinois. The instant opinion, by inference, embodied and upheld the Gibbs holding by stating that ¶18-12 provided additional time constraints.

As noted in the jurisdictional statement herein, the Illinois Supreme Court further upheld the rationale of the Gibbs decision by placing the burden of discovering the death of the person against whom the claim was sought on the claimant.

(Appendix A, p. 13).

In Baker v. McKnight, 4 Ohio 3d 125, 447 N.E.2d 104 (1983), the Ohio Supreme Court specifically overruled its earlier decision in Barnhardt v. Schulz, 53 Ohio 2d 59, 372 N.E.2d 589 (1976). In so doing, the court held that an amendment to a complaint after the applicable statute of limitations had run naming the executor of the estate of a deceased tortfeasor, related back to the original complaint filed within the limitations period naming the tortfeasor who had died prior to the filing of the original complaint. The court in Baker stated, however, that the Barnhardt decision still represented the majority rule. The opinion of Baker did not reverse on due process grounds for lack of effective notice, but rather, on procedural grounds. Baker serves to highlight the confusion that exists, and

perhaps the frustration, which in the majority of states results in deprivation of protected property rights as a distinct corollary to the holdings of cases analyzed and rejected in Tulsa Professional Collection Service, Inc. v. Pope, 485 U.S. _____, 99 L.Ed.2d 565, 108 S.Ct. ____ (1988), including the Illinois case of Gibbs.

The case of Laudenslager v. Teeple, 466 F.2d 249 (3d Cir. 1972), while permitting an amendment that related back, likewise did so on procedural grounds, not on failure of due process.

United States Supreme Court Decisions

The whole context of constructive notice cases has been dealt with in the very recent case of Tulsa Collection Services, Inc. v. Pope, 485 U.S. ____, 99 L.Ed.2d 565, 108 S.Ct. ____ (1988). The temptation was great to reiterate the

principals contained in the cases cited therein, particularly the astute observation of those principals of due process as set out in Logan v. Zimmerman Brush Co., 455 U.S. 422, 21 L.Ed.2d. 405, 102 S.Ct. 1148 (1982), Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), and Mullane v. Central Hanover Bank and Trust Co., 336 U.S. 306 (1950). Little purpose would be served, however, because the determination of the issues in Tulsa, we contend, are controlling of the issue presented here. Indeed, it would appear mandatory that "equal protection" requires application of that law to one who files a timely complaint in order to comply with a state's limitations' requirement so as to protect his cause of action, only to find they are deprived of their property right because they were not afforded actual notice of the probate proceedings of the

deceased defendant which proceedings triggered the time bar.

In distinct contrast to the Tulsa case where the creditor knew of the death of Pope, Vaughn in the instant case did not know of Speaker's death, nor did his counsel. This serves to pinpoint the need for actual notice by mail to the one possessing a known claim.

Notice by Mail to One Possessing a Cause of Action

As noted earlier, insofar as a property right is concerned, the cases prevent any rational distinction between a claim by contract and a viable cause of action. In each case, it is the probate proceeding that triggers the time bar and it is that feature which distinguishes it from a self-executing statute of limitations.

In Tulsa, the Court remanded the case

to determine whether "reasonably diligent efforts" would have "identified appellant and uncovered his claim." 99 L.Ed.2d at 579. Here, decedent was required to file an accident report with the state. (Ill. Rev. Stat. ch. 95 1/2, ¶16-107 (1985)). The decedent also carried liability insurance, the carrier of which was currently negotiating the claim against Speaker. Further, it was alleged that Adeline Speaker, a co-executor and surviving spouse, knew of the claim, which allegation was not denied by respondent. Appellant's claim was also "filed" with the decedent's agent, the insurance company, and so his estate certainly had constructive notice of the claim. It would seem a realistic requirement that insurance carriers of a deceased should be canvassed for claims. The nature of appellant's claim here is very nearly one

of public knowledge due to police reports, insurance reports, payment of bills for damage to the decedent's vehicle, his own medical bills, and a variety of facts which would expose the appellant's claim.

CONCLUSION

This Court's explicit opinion in Tulsa reversed Illinois law which prevailed at the time this matter was fully briefed to the Illinois Supreme Court. Following the filing of the opinion of the Supreme Court of Illinois on December 21, 1988, petitioner immediately filed a petition for rehearing asserting that petitioner had been deprived of due process in violation of the Federal Constitution's Fourteenth Amendment. By denying that petition for rehearing, the Illinois Supreme Court validated the holding in Gibbs as it applied to the case at bar.

It should also be noted that the case

also clearly illustrates a violation of the Equal Protection Clause in the Fourteenth Amendment in that one who possesses a cause of action against a deceased tortfeasor does not have the same rights under the Illinois statute of limitations (Ill. Rev. Stat. ch. 110, ¶13-209 (1985)) that a person has who possesses a cause of action against a person who is living.

The court should grant certiorari to review the judgment of the Supreme Court of Illinois insomuch as it resulted in denial to the petitioners of their rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the Equal Protection clause therein, and insofar as it upheld the validity of Ill. Rev. Stat. ch. 110, ¶13-209 (1983) and ch. 110 1/2, ¶¶18-12, 18-3 (1985), against petitioner's claim they were unconstitutional insofar as

those statutes were construed to deprive petitioners of their right of due process.

Respectfully submitted,

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A P P E N D I X

APPENDIX A

Docket Nos. 65736, 65783 cons.—Agenda 23—May 1988. JANET D. VAUGHN *et al.*, Appellants, v. ADELINE SPEAKER *et al.*, Appellees.

JUSTICE CUNNINGHAM delivered the opinion of the court:

In the circuit court of Whiteside County, on November 27, 1985, Janet D. Vaughn and Richard L. Vaughn filed a complaint against Wilbur P. Speaker, alleging that on December 2, 1983, Speaker negligently caused an automobile accident in which Janet D. Vaughn was injured, and requesting that the cause be tried by a jury. Wilbur P. Speaker had died on January 16, 1985, although plaintiffs were unaware of this fact when they filed the initial complaint. Plaintiffs first learned of the death on December 5, 1985, when the summons was returned to plaintiffs' attorneys without having been served on anyone; the returned summons indicated that Wilbur P. Speaker was deceased. Plaintiffs then, on December 23, 1985, filed a motion to correct misnomer, which was granted. On that same date, plaintiffs filed a complaint making the same allegations as in the initial complaint but naming as defendants "Adeline Speaker and Janet E. Prescott, as Co-Executors of the Estate of Wilbur P. Speaker." A summons was served on December 31, 1985. Defendants moved to dismiss, asserting that the applicable statute of limitations barred the action.

Plaintiffs filed a memorandum in opposition to the motion to dismiss, asserting upon various theories that, for statute of limitations purposes, the second complaint related back to the initial filing. Plaintiffs also asserted in their memorandum that defendants were estopped from asserting the statute of limitations as a defense. Plaintiffs contended (with a supporting affidavit) that

the totality of various acts and omissions by the insurance adjuster induced them to believe both that Wilbur Speaker was still living and that the statute of limitations would not be asserted. Specifically, plaintiffs contended that the insurance adjuster conceded liability and made a settlement offer prior to Wilbur Speaker's death. Negotiations continued after the death and allegedly even after the date on which the initial complaint was filed. According to plaintiffs, neither defendants themselves nor the insurance adjuster informed them of the death. Plaintiffs' arguments were rejected and the complaint was dismissed.

The appellate court found that the action was not timely. (156 Ill. App. 3d 962.) Relying on *Bavel v. Cavaness* (1973), 12 Ill. App. 3d 633, the appellate court found that the initial action, filed against decedent, was a nullity and could not be amended. The appellate court further found that therefore the second complaint did not relate back to the date of the initial filing and was barred by the applicable statute of limitations. The appellate court also found, however, that an issue of fact existed as to whether defendants were estopped to assert the statute of limitations. The appellate court indicated that evidence suggested the possibility that defendants' insurance company may have lulled plaintiffs into a false sense of security, thereby causing them to delay the assertion of their rights.

Pursuant to Supreme Court Rule 315 (107 Ill. 2d R. 315), we granted plaintiffs' petition for leave to appeal regarding whether their complaint was timely filed, and we also granted defendants' petition for leave to appeal regarding whether the evidence raised the possibility that defendants are estopped to assert the statute of limitations.

We first address the issue of whether the complaint against the co-executors was timely filed. In order for us to find that the second complaint was timely filed, we must find that it related back to the date on which the first complaint was filed. The statute of limitations generally governing actions for personal injuries, set forth in section 13—202 of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1987, ch. 110, par. 13—202), is two years, and the second complaint was filed over two years from the date of the injury. Moreover, even assuming, *arguendo*, that section 13—209 of the Code is otherwise applicable, it is of no benefit to plaintiffs. Section 13—209 provides in part:

> "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, an action may be commenced against his or her executors or administrators after the expiration of the time limited for the commencement of the action, *and within 6 months after the issuing of letters of office.*" (Emphasis added.) (Ill. Rev. Stat. 1987, ch. 110, par. 13—209.)

With respect to decedent's estate, letters testamentary were issued on February 13, 1985, more than *10 months* before the action was filed naming the co-executors as defendants. Thus, even if section 13—209 were otherwise applicable, it would be of no assistance to plaintiffs here.

We also note that section 18—12 of the Probate Act of 1975 (Ill. Rev. Stat. 1987, ch. 110½, par. 18—12), relied on by plaintiffs, is no basis for asserting that the second complaint was filed prior to the running of the statute of limitations. The language of section 18—12 (entitled "Limitations on payment of claims") clearly does not *extend* any otherwise applicable statute of limi-

tations but instead imposes *additional* time constraints for making certain claims against a decedent's estate.

We must therefore determine whether the second complaint relates back (for statute of limitations purposes) to the initial complaint which named as defendant a deceased individual. For us to simply label the initial suit a "nullity" (see *Wells v. Lueber* (1976), 43 Ill. App. 3d 973; *Reed v. Long* (1970), 122 Ill. App. 2d 295) would be to answer this question in the negative without explanation. We must instead first examine certain Code provisions relied on by plaintiffs in the appellate court (provisions involving the relationship between the amendment of pleadings and the running of a statute of limitations) and determine whether any of those provisions apply.

The provisions upon which plaintiffs relied (in the alternative) during appeal from the circuit court include sections 2—1008(b), 2—616 and 2—401 of the Code (Ill. Rev. Stat. 1987, ch. 110, pars. 2—1008(b), 2—616, 2—401). We recognize that, as stated in section 1—106 of the Code (Ill. Rev. Stat. 1987, ch. 110, par. 1—106), these and other Code provisions are to be liberally construed. Even under a most liberal construction, however, none of these three provisions (sections 2—1008(b), 2—616 and 2—401) is of avail to plaintiffs.

Section 2—1008(b) provides in part that "[i]f a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court." (Ill. Rev. Stat. 1987, ch. 110, par. 2—1008(b).) A plain reading of this provision indicates that the General Assembly was referring to situations in which a living being who is already a party to a pending action passes away; the provision was not meant to encompass a situation such as that which is now before this court.

Section 2—401 addresses situations involving a misnomer. That section provides in part that a misnomer of a party "is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." (Ill. Rev. Stat. 1987, ch. 110, par. 2—401(b).) This provision does not encompass naming the wrong party but instead encompasses naming the right party by the wrong name. (*Cigan v. St. Regis House Hotel* (1979), 72 Ill. App. 3d 884.) The determination of whether the correction of a particular error in naming a party is merely a correction of a misnomer, or is instead an actual change of parties, should be made based upon conclusions about the intention and understanding of the parties. See *Cigan*, 72 Ill. App. 3d at 887.

We cannot conclude that changing the name of the defendant from decedent to his executors is simply the correction of a misnomer. This is not a situation where, for example, a plaintiff merely misspelled a defendant's surname or used an incorrect common name. Instead, plaintiffs here intentionally sued Wilbur P. Speaker when they should have sued his estate. Certainly decedent's estate is the legal successor to certain rights and liabilities of the decedent, but an individual and his estate cannot exist contemporaneously and are wholly distinct legal entities. Accordingly, substitution of the estate for the decedent was not merely the correction of a misnomer, and section 2—401 cannot be invoked for relation back of the second complaint to the date of the original filing.

We next turn to a consideration of the applicability of section 2—616(d) of the Civil Code, which states in part:

> "A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time

> within which an action may be brought or right asserted, if all the following terms and conditions are met: (1) the time prescribed or limited had not expired when the original action was commenced; (2) failure to join the person as a defendant was inadvertent; (3) service of summons was in fact had upon the person, his or her agent or partner, as the nature of the defendant made appropriate, even though he or she was served in the wrong capacity or as agent of another, or upon a trustee who has title to but no power of management or control over real property constituting a trust of which the person is a beneficiary; (4) the person, within the time that the action might have been brought or the right asserted against him or her, knew that the original action was pending and that it grew out of a transaction or occurrence involving or concerning him or her; and (5) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading ***." (Ill. Rev. Stat. 1987, ch. 110, par. 2—616(d).)

The appellate court found this provision inapplicable because "[i]n order for section 2—616 to apply there must also be an action pending against a person not originally named a defendant" (156 Ill. App. 3d at 965), and, in the appellate court's view, the complaint filed against the decedent was a nullity and thus did not give rise to a pending action. Regardless of whether an action against a decedent is under all circumstances a nullity, section 2—616(d) provides no relief to plaintiffs because the fourth requirement of that provision was not met: there is no indication or assertion that either co-executor knew prior to the running of the statute of limitations that a complaint had been filed.

We point out that Federal and other State courts which have permitted substitution of an executor or administrator as defendant in an action initiated against a

decedent have typically relied upon a provision which, like section 2—616(d), required that the substituted defendant receive notice of the pending action prior to the lapse of the limitations period. (See Fed. R. Civ. P. 15(c); *Loudenslager v. Teeple* (3d Cir. 1972), 466 F.2d 249; *Baker v. McKnight* (1983), 4 Ohio St. 3d 125, 447 N.E.2d 104; *Eberbach v. McNabney* (Ind. App. 1981), 421 N.E.2d 651.) Where the prospective defendant did not receive proper notice, courts have typically found that the complaint did not relate back to the date of the original filing. See, *e.g., Sassi v. Breier* (7th Cir. 1978), 584 F.2d 234.

We note also that section 2—616(b) of the Code (Ill. Rev. Stat. 1987, ch. 110, par. 2—616(b)) (dealing with amended pleadings raising claims growing out of the same transaction or occurrence as involved in an original claim) has occasionally been invoked by our appellate court to permit changing the capacity of a party plaintiff after a statute of limitations has elapsed. (See, *e.g., Pavlov v. Konwall* (1983), 113 Ill. App. 3d 576; *Redmond v. Central Community Hospital* (1978), 65 Ill. App. 3d 669.) While we express no opinion whether section 2—616(b) was properly applied in those cases, we do conclude that the provision was not intended to govern amending pleadings to substitute defendants. Section 2—616(b) clearly addresses situations in which a plaintiff seeks to add or amend claims against defendants already parties to the action, whereas section 2—616(d) of the Code (Ill. Rev. Stat. 1987, ch. 110, par. 2—616(d)) addresses situations in which a plaintiff seeks to substitute or add distinct defendants.

Plaintiffs have thus not pointed out, and we have not found, any Code provision by which the second complaint can be said to relate back to the date of the initial

filing. Nor may we formulate such a rule under our inherent and statutory authority to formulate rules of procedure. (See Ill. Rev. Stat. 1987, ch. 110, par. 1—104.) It is true, as plaintiffs submit, that rules regarding amendments to pleadings are procedural in nature, as is a statute of limitations itself. But even though procedural in nature, a statute of limitations, if properly asserted by one entitled to its protection, is a bar to an action. It is a legislatively determined deadline for commencing an action against one who otherwise might be legally indebted to a plaintiff. This court may not, under the guise of procedural rulemaking, effectively eviscerate a valid statute of limitations.

We next turn to the question whether defendants, coexecutors of the estate, are estopped from asserting the statute of limitations as a defense. In this regard we must point out that "equitable estoppel" and "waiver" are two distinct concepts, though they have similarities and are sometimes used interchangeably. A waiver is a voluntary relinquishment of a known right, claim or privilege (*Pantle v. Industrial Comm'n* (1975), 61 Ill. 2d 365), whereas an equitable estoppel may arise even though there was no intention on the part of the party estopped to relinquish any existing right. Moreover, prejudice to the other party is one of the essential elements of an equitable estoppel, whereas a waiver does not necessarily imply that the party asserting it has been misled to his detriment. (See generally 28 Am. Jur. 2d *Estoppel & Waiver* §30 (1966).) In the instant case, there is an assertion not that defendants intentionally relinquished a right to assert a limitations defense, but only that their conduct so misled plaintiffs that defendants are estopped from asserting the defense.

In *Lowenberg v. Booth* (1928), 330 Ill. 548, 555-56,

this court set forth six elements of equitable estoppel, elements which we herein discuss. First, there must be words or conduct by the party against whom the estoppel is alleged amounting to a misrepresentation or concealment of material facts. Second, the party against whom the estoppel is alleged must have had knowledge at the time the representations were made that the representations were untrue. This knowledge need not be actual but may be implied; misrepresentations made with gross negligence can form a basis for equitable estoppel. (*Wright v. Stice* (1898), 173 Ill. 571.) Third, the truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time that the representations were made and at the time that they were acted on by him. Fourth, the party estopped must intend or reasonably expect that his conduct or representations will be acted upon by the party asserting the estoppel or the public generally; the conduct and representations must be such as would ordinarily lead to the results complained of. (*Hefner v. Vandolah* (1871), 57 Ill. 520; see generally 28 Am. Jur. 2d *Estoppel & Waiver* §41 (1966).) Fifth, the party claiming the benefit of the estoppel must have in good faith relied upon the misrepresentation to his detriment. It has been said that this reliance must be reasonable, and that a party claiming estoppel cannot have acted improvidently. (See generally 18 Ill. L. & Prac. *Estoppel* §22 (1956).) While this is true as a general rule, it is also true that if the party alleged to be estopped is guilty of actual intentional deceit and he reasonably expected his deceptive statements or conduct to be relied upon, he is in no position to contend that the party acting upon his deception was negligent in doing so. This is consistent with the principle that one guilty of fraudulent misrepresentation cannot assert that the person defrauded was negligent in

failing to discover the truth. (See *Schmidt v. Lanfield* (1960), 20 Ill. 2d 89; *Stephens v. Clark* (1922), 305 Ill. 408.) The sixth requirement is that the party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party is permitted to deny the truth thereof.

Having set forth the elements of equitable estoppel, we examine the facts which plaintiffs assert give rise to estoppel in this particular case. Although we need not determine whether, had the insurance company been timely *notified* of Speaker's death, it would have had a duty to so inform plaintiffs, we decline to impose any affirmative duty on an insurance company to *monitor* the status of its insured and notify claimants of the insured's death. Nor did the appellate court invoke any such affirmative duty in finding an arguable basis for estoppel. Rather, the appellate court instead noted various activities of defendants which lulled plaintiffs into delaying suit, mistakenly believing that their claim would be settled on agreeable terms. We, too, address this basis for estoppel.

Conduct sufficient to create a reasonable belief in the plaintiffs that a claim will be settled may consist of numerous factors, including concession of liability by the insurer (*Wells v. Lueber* (1970), 43 Ill. App. 3d 973; *Kinsey v. Thompson* (1963), 44 Ill. App. 2d 304), and payments by the insurer during the period of negotiation (*Flagler v. Wessman* (1970), 130 Ill. App. 2d 491). We point out that in considering these factors, conduct occurring prior to Wilbur Speaker's death may be as relevant as conduct occurring after his death. As stated in Illinois Law & Practice *Estoppel* §22, at 83 (1956), "an estoppel extends to and binds not only the person origi-

nally estopped, but also those who are in privity of blood, privity of estate, and privity of law."

The facts related to this basis for estoppel include allegations that the insurer conceded liability, paid the property damage claim, offered $15,000 to settle the personal injury claim (which offer was apparently never withdrawn), and engaged in extensive negotiations regarding the extent of personal injuries. Considering the totality of the alleged representations and conduct of the insurance company and the estate, we believe there is a question for the trier of fact as to whether this conduct lulled plaintiffs into delaying the filing of their suit and whether, if defendant's conduct in this regard was unintentional, plaintiffs' reliance in delaying suit was reasonable.

In addressing this factual basis for estoppel, we find it helpful to focus in particular on one of the elements of equitable estoppel: *detrimental* reliance. Defendants submit that a reliance on their alleged misrepresentations regarding an intent to pay the claim, even if otherwise legally sufficient, is insufficient here as a matter of law because that reliance was not detrimental. Defendants submit that the detriment (expiration of the limitations period) did not arise from plaintiffs' reliance on defendants' intent to pay the claim, no matter how reasonable that reliance may have been. Defendants point out that the initial complaint (naming the decedent as defendant) was filed *before* the limitations period elapsed. Defendants reason that the detriment was therefore due not to a delay in filing suit, but to a failure to ascertain before filing suit that defendant had died. The counterargument is, of course, that if defendants had not lulled plaintiffs into delaying suit, plaintiffs would have learned of the death with sufficient time to file a second complaint be-

fore the limitations period elapsed.

The trier of fact will have to determine whether it was plaintiffs' reliance on defendants' apparent intent to pay the claim which was detrimental, or whether instead some other act, representation or omission, such as defendants' failure to disclose or plaintiffs' failure to independently learn of the death, was detrimental. We do not rule on this question as a matter of law. We do, however, wish to articulate a standard for answering this question. The standard which we adopt for determining whether reliance was detrimental is whether the reliance played a substantial part, and so was a substantial factor, in influencing the decision (in this case, the decision to file a complaint naming decedent, shortly before the limitations period elapsed). This is the standard set forth in Restatement (Second) of Torts §546, Comment *b*, (1977), regarding actions for fraud. See also *E/M Lubricants, Inc. v. Microfral, S.A.R.L.* (1981), 91 F.R.D. 235 (invoking this standard when applying Illinois law).

We point out that when arguing that plaintiffs' reliance (if any) on defendants' conduct played no substantial role in bringing about plaintiffs' predicament, defendants cannot contend (as they have in this court) that as a matter of law the public filing of the death certificate immediately put plaintiffs on notice of the death. For this argument defendants have relied on *Lowenberg v. Booth* (1928), 330 Ill. 548. In *Lowenberg*, this court reasoned that public records disclosed the ownership of certain realty and that the party asserting estoppel should reasonably have checked those records.

Lowenberg is distinguishable on several grounds. One basis for distinguishing *Lowenberg* is that it involved land records. The failure to check land records (involved in *Lowenberg*) cannot be equated to this situation, for

numerous reasons. First, a person interested in searching land records generally knows exactly with whom to check: the recorder of deeds of the county of the realty's *situs*. By contrast, a person seeking to determine whether a person has died has no way of knowing with certainty in what county a death certificate might be recorded, or how promptly after the death the certificate would be recorded. Moreover, depending upon a wide variety of circumstances, such as a person's age and health, the likelihood of his having recently died may be very remote. We must leave it to the trier of fact to decide whether reasonable prudence dictated an attempted verification that Speaker was alive.

Lowenberg is also distinguishable because the conduct allegedly creating estoppel there was failure to disclose information which could have been ascertained from public records. By contrast, in this case the conduct upon which we have focused is not defendants' failure to disclose information in public records (*i.e.*, Speaker's death) but rather conduct allegedly lulling plaintiffs into delaying their initial filing of suit. If the reasonableness of reliance is *directly* put in issue here (as it will be if defendants' conduct is grossly negligent rather than intentional), it will be the reasonableness of relying on defendants' apparent intent to settle rather than on their failure to disclose Speaker's death. The question whether plaintiffs reasonably assumed Speaker remained alive becomes relevant only on the issue of causation, when determining whether defendants' misleading conduct (lulling plaintiffs into delaying suit) played a *substantial role* in causing the claim to become time-barred. The trier of fact may well find that plaintiffs carelessly failed to check the public records and nevertheless conclude defendants' conduct did play a substantial role in

bringing about plaintiffs' predicament.

As did the appellate court, we must reverse the circuit court's grant of the motion to dismiss, and remand this cause for a determination whether defendants are estopped from asserting the statute of limitations as a defense. We do agree with the appellate court that the estoppel issue should be determined by a trier of fact other than the jury which may determine the merits of the negligence action. We do not agree, however, that the estoppel issue must be determined by a separate *jury*. Equitable estoppel, when considered separately and prior to the cause of action itself, may be determined by the circuit court. (Contra *Kinsey v. Thompson* (1963), 44 Ill. App. 2d 304.) There is no constitutional right to a jury trial in equitable proceedings or proceedings seeking equitable relief. (*Lazarus v. Village of Northbrook* (1964), 31 Ill. 2d 146.) In accordance with section 2—1111 of the Civil Code (Ill. Rev. Stat. 1987, ch. 110, par. 2—1111), the circuit court may, of course, in its *discretion*, use a jury to determine the estoppel issue.

For the foregoing reasons, the circuit court's grant of the motion to dismiss is reversed, the appellate court's decision is affirmed, and this cause is remanded to the circuit court for determination of whether defendants are estopped from asserting the statute of limitations as a defense, before proceeding to the trial, if any, on the merits.

Affirmed.

JUSTICE RYAN, specially concurring:

I agree that this case must be remanded to the trial court, but, in my opinion, the hearing should be to determine whether the defendants have waived their right to assert the statute of limitations as a defense, not

whether they are estopped to raise that defense. I do not agree that there has been any question of fact raised in this case concerning equitable estoppel. In the first place, the plaintiffs were not lulled into failing to file their complaint before the limitation period had expired, because they in fact did file it five days before the statute ran. The plaintiffs just sued a party that did not exist. Their failure to sue the proper party cannot be attributed to the conduct of the representative of the insurance company, because his affidavit filed in the trial court shows that he did not know Speaker was deceased until plaintiffs' attorney called and told him of this fact after the limitation period had run. The party against whom equitable estoppel is asserted must have had knowledge at the time of the alleged representations that they were not true. (*Lowenberg v. Booth* (1928), 330 Ill. 548; *Barbour v. South Chicago Community Hospital* (1987), 156 Ill. App. 3d 324, 330; *Stewart v. O'Bryan* (1977), 50 Ill. App. 3d 108, 111; see also *Chicago Park District v. Kenroy, Inc.* (1980), 78 Ill. 2d 555, 563.) Silence may give rise to equitable estoppel, but only when there is *knowledge* of the facts on one side and ignorance on the other. (*Town & Country Bank v. James M. Canfield Contracting Co.* (1977), 55 Ill. App. 3d 91, 95.) Thus, the essential element of knowledge by the defendant has not been shown in this case, either by the pleadings or the memorandum submitted to the trial court by the plaintiffs and the affidavit attached thereto.

Furthermore, there had been no contact at all between the representative of the insurance company and plaintiffs' attorney for more than four months before the limitation period had expired. In *Suing v. Catton* (1970), 118 Ill. App. 2d 468, 473, the appellate court stated: "Where the inducement for delay has ceased to operate

before the expiration of the limitation period and the plaintiff has a reasonable time remaining within which to institute his suit, he cannot raise estoppel as an excuse for not filing his action within the time specified by the statute of limitations," citing *Reat v. Illinois Central R.R. Co.* (1964), 47 Ill. App. 2d 267.

As indicated above, plaintiffs were not lulled into not filing their complaint within the limitation period, because they had filed it before the time had expired. However, the rationale of the principle stated in *Suing v. Catton* applies equally well to this case. Whatever erroneous inferences plaintiffs may have drawn as a result of previous contacts with the representative of the insurance company concerning whether Speaker was living, the fact remains that the last contact between the insurance company and plaintiffs' attorney occurred more than four months before the limitation period had expired. Thus, plaintiffs had a reasonable time before the statute ran to ascertain whether Speaker was living, and should not now be permitted to excuse this error by claiming estoppel. In *Vail v. Northwestern Mutual Life Insurance Co.* (1901), 192 Ill. 567, 570, this court said: "A party claiming the benefit of an estoppel cannot shut his eyes to obvious facts, or neglect to seek information that is easily accessible, and then charge his ignorance to others."

Although I do not agree with the reasoning of the majority opinion on the estoppel issue, there is one thin thread of evidence in this case which compels me to concur in the result reached by the majority. This thin thread involves waiver, and not equitable estoppel. Although these two doctrines are often discussed together and the terms are often used interchangeably, they are in fact two different concepts, and waiver may be estab-

lished even though the acts and conduct are not sufficient to establish estoppel. (See generally 28 Am. Jur. 2d *Estoppel & Waiver* §30 (1966).) Waiver is a voluntary and intentional relinquishment of a known right. (*Harris v. Faultfinders, Inc.* (1981), 103 Ill. App. 3d 785.) Waiver, as distinguished from estoppel, depends upon what the defendant did or intended to do, without regard to the effect of his conduct upon the plaintiffs. *Pantle v. Industrial Comm'n* (1975), 61 Ill. 2d 365, 372.

In the case before us, plaintiffs attached an affidavit to their "Memorandum in Opposition to Motion to Dismiss," which was filed in the trial court in response to the defendant's motion to dismiss. The motion to dismiss was based on plaintiffs' failure to file the complaint within the time permitted by law. The affidavit is that of the attorney for the plaintiffs. In the affidavit, the attorney, among other things, states that he had negotiated with the defendant's insurance company "and last attempted negotiation with Iowa Mutual Insurance Company on December 30, 1985, after the Statute of Limitations had run." From this quoted language it is not clear whether plaintiff's attorney last attempted to negotiate on December 30, 1985, or whether the insurance company had tried to negotiate a settlement on that date after the limitation period had expired. A reply memorandum was filed in the trial court, attached to which was an affidavit of the employee of the insurance company who handled the Speakers file. In this affidavit, he states, "I did not communicate with plaintiff's counsel concerning settlement after July 29, 1985." Thus, it appears that there may be a conflict in the two affidavits as to whether the insurance company attempted to negotiate after the statute had run. I, therefore, agree that this case should be remanded to the trial court and that

a hearing should be held. However, in my opinion, the hearing should be limited to the question of waiver; that is. did the defendant's insurance carrier attempt to negotiate a settlement after the limitation period had expired, and if so, did the insurance company thereby indicate a relinquishment of its right to assert the limitations defense. For the reasons stated herein, I concur that this case should be remanded to the trial court, but I do not agree that a hearing should be held on the question of estoppel, or that anything has been presented to this court or to the trial court which indicates that an equitable estoppel can be asserted against the defendants.

JUSTICE MILLER joins in this special concurrence.

APPENDIX B

ILLINOIS SUPREME COURT
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January 30, 1989

Mr. Bernard P. Reese, Jr.
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Rockford, IL 61103

Nos. 65736 -- Janet D. Vaughn, et al.,
65783 appellees, v. Adeline
Cons. Speaker, et al., etc.,
appellants. Appeal,
Appellate Court, Third
District.

The Supreme court today DENIED the petitions for rehearing in the above entitled cause. Calvo, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 9, 1989.

APPENDIX C

The following states provide that if a statute of limitations has not expired on the death of the defendant, plaintiff has an extension of the time shown as follows for filing after the decedent's death.

1. Colorado - 1 year.
   Colo.Rev.Stat. §§13-80-112, 15-12-109.

2. Iowa - 6 months.
   Iowa Code §614.2 (1964).

3. Kentucky - 1 year.
   Ky.Rev.Stat. §413.180(3) (1984).

4. Michigan - 2 years after letters issued or 6 years after death.
   Mich.Comp.Laws §600.5852 (1980).

5. New York - 18 months.
   N.Y.Civ.Prac.Law §210(b).

6. Oregon - 1 year.
   Or.Rev.Stat. §12.190 (1983).

7. Rhode Island - 1 year after executor appointed, or three years after death.
   R.I.Gen.Laws §9-1-21.

8. Utah - 1 year.
Utah Code Ann. §75-3-801 (1978).

9. Arizona - 1 year, unless representative is qualified sooner, but in no event is extension less than four months.
Ariz.Rev.Stat.Ann. §14-3801 (1975).

10. Indiana - 18 months.
Ind.Code §34-1-2-7 (1983).

APPENDIX D

The following states provide that a claim must be filed or cause of action asserted against the executor or administrator as follows if letters of office are issued, or within the time indicated either from decedent's death or if no letters are issued.

1. Arkansas - 6 months; 5 years if no letters.
   Ark.Stat.Ann. §62.2111 (1971).

2. Florida - 3 months after notice; 3 years if no letters.
   Fla.Stat. §733.701 (1987).

3. Illinois - 6 months; 3 years if no letters.
   Ill.Rev.Stat. ch. 110 1/2, ¶18-12 (1985).

4. New Hampshire - 6 months; 2 years from death.
   N.H.Rev.Stat.Ann. §§556.1, 556.3, 556.29 (1974).

5. New Mexico - 2 months; 3 years after death.
   N.M.Stat.Ann. §45-3-803.

6. Idaho - 4 months; 3 years.
   Idaho Code §15-3-803(a)(1)(2) (1979).

7. Missouri - 6 months; 3 years.
   Mo.Rev.Stat. §473.360(1),(3) (1986).

APPENDIX E

The following states provide the claim or cause of action must be filed within the time for filing claims provided in the notice of publication or be forever barred.

1. Delaware - 6 months.
   Del.Code Ann. tit.12, §2102 (1979).

2. Georgia - 3 months.
   Ga.Code §53-7-92.

3. Kansas - 4 months.
   Kan.Stat.Ann. §59-2236 (1978).

4. Maryland - 6 months.
   Md. Est. & Trusts Code Ann. §8-103 (1974).

5. Massachusetts - 4 months.
   Mass.Gen.Laws Ann. Ch. 197, §9.

6. Nebraska - 2 months.
   Neb.Rev.Stat. §3-803.

7. North Carolina - As provided in notice.
   N.C.Gen.Stat. §1-22 (1984).

8. Oklahoma - 2 months.
   Okla.Stat. Tit.58, §333 (1981).

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1791

In The

Supreme Court of the United States

October Term, 1988

JANET D. VAUGHN and RICHARD L. VAUGHN,

Petitioners,

vs.

ADELINE SPEAKER and JANET E. PRESCOTT, Co-Executors of the Estate of WILBUR P. SPEAKER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is sufficient state involvement in the running of a general statute of limitations to implicate the due process clause of the United States Constitution.

2. Whether the invoking of a statute of limitations defense by a private party rises to the level of state action.

3. Whether this Court should exercise its jurisdiction to review a state law matter which has been resolved by the highest court of that state.

LIST OF ALL PARTIES TO PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case.

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B. The ruling of the Illinois Supreme Court rests on an independent and adequate state ground. This court has stated that it is bound to accept such an interpretation of state law 9

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STATUTES INVOLVED

In addition to the state statutes set forth in the Petition for Writ of Certiorari, this case involves the following statutes:

Illinois Revised Statutes, Ch. 110, § 13-202:

"Actions for damages for an injury to the person . . . should be commenced within 2 years next after the cause of action occurred"

Illinois Revised Statutes, Ch. 110, § 13-203:

"Actions for damages for loss of consortium or other actions deriving from injury to the person of another . . . shall be commenced within the same period of time as actions for damages for injury to such other person."

REASONS FOR DENYING THE WRIT

I.

STATEMENT OF CASE

On December 2, 1983 automobiles operated by Janet Vaughn and Wilbur P. Speaker collided. Mrs. Vaughn claimed that she was injured and retained counsel. Mr. Speaker died on January 16, 1985, a fact which was unknown to his insurance representative. Plaintiff's counsel also claims that he was unaware of the death. The death certificate was a matter of public record.

Some discussions took place between plaintiffs' attorney and a representative of Iowa Mutual Insurance Company, the carrier which issued a policy covering the Speaker vehicle at the time of the subject collision. The

last such contact was on July 29, 1985, more than four months before expiration of the two-year statute of limitations provided by Illinois law for the filing of a personal injury action.

For some reason, the attorney representing the plaintiffs waited until five days before the limitations period expired to file suit against Mr. Speaker. The action sought damages for personal injuries and loss of consortium on behalf of Mrs. Vaughn and her husband respectively. The summons was returned indicating the death of the decedent. On December 23, 1985, plaintiffs' counsel obtained entry of an *ex parte* Order granting a Motion to Correct Misnomer. He then named Adeline Speaker and Janet E. Prescott, Co-Executors of the Estate of Wilbur Speaker, as defendants. Thus they were first sued 21 days after the statute of limitations had expired.

A week later, on December 30, 1985, plaintiffs' counsel called the insurance company and attempted to reopen negotiations. In the course of that conversation, he advised the carrier that Mr. Speaker had died.

A Motion to Dismiss based on the statute of limitations was filed on behalf of the defendants. This motion was allowed by the trial court. Respondent's Appendix, pp. App. 1-3; Petition for Writ of Certiorari, Appendix, pp. 1-2. The plaintiffs appealed and the Illinois Appellate Court, Third District, affirmed the ruling of the trial judge that the attempted filing prior to the end of the limitations period was a nullity because a dead person is a non-entity for purposes of litigation and that the action was barred by the statute of limitations. No statute exists in Illinois allowing this type of untimely-filed action to

relate back prior to the expiration of the limitation period. However, the case was remanded for a determination of whether or not the defendants were estopped to raise this defense due to the conduct of the insurer. This ruling, as to both limitations and estoppel, was affirmed by the Illinois Supreme Court. Petitions for Rehearing were filed by both sides. Despite the fact that *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 565 (1988), had been decided over one month prior to oral arguments, the Petition for Rehearing filed on behalf of the plaintiffs was the first time the constitutional argument was raised. Both Petitions for Rehearing were denied.

Thus, the decision of the Illinois Supreme Court did not pertain to the limitation imposed by the Probate Act, but to the use of the statute of limitations by private parties and further interpreted Illinois statutes pertaining to means of relating back untimely-filed actions. Additionally, the decision of the Illinois Supreme Court is not final because the case has been remanded to the trial court for further proceedings.

II

SUMMARY OF ARGUMENT

In Illinois, a claimant is entitled to the full period afforded by the applicable statute of limitations to initiate an action against a decedent who is insured. Such a claimant is not limited to the shorter claim period provided by the Probate Act. Accordingly, this case involves the private use of a self-executing statute of limitations.

The Fourteenth Amendment affords due process protection against loss of property rights only if the deprivation is by state action. The state's involvement in the running of a general statute of limitations is not sufficient to implicate due process. This case, contrary to the claims of the plaintiffs, is one involving state law questions and does not warrant the involvement of this Court.

III

ARGUMENT

A.

THE ILLINOIS SUPREME COURT DETERMINED THAT SUIT WAS NOT FILED PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS PERTAINING TO PERSONAL INJURY ACTIONS. THE DEFENDANTS' PRIVATE USE OF THE LIMITATIONS DEFENSE DOES NOT INVOLVE SUFFICIENT STATE ACTION TO IMPLICATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The record is undisputed that Wilbur Speaker was insured on the date of the automobile accident giving rise to this personal injury action. For this reason, under Illinois law, the plaintiffs had the entire two years permitted by the general statute of limitations pertaining to personal injury actions to file their suit. They were not required to do so within the Probate Act claim period.

The plaintiffs attempt to create a constitutional question by relying on this Court's decision in *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed 2d 565 (1988), which pertained to the adequacy of notice to creditors under a probate statute. In that case, a collection agency failed to file a claim within

the two-month period prescribed by the Oklahoma probate statute. This Court held that due process guarantees prohibit a probate statute from dispensing with actual notice to creditors who are reasonably ascertainable and that, in the absence of such notice, a claim can be filed.

The plaintiffs in the instant case go so far as to claim that the Illinois Supreme Court "ruled that appellant's claim was time barred under the provisions of Ill.Rev.Stat. Ch. 110½, § 13-209."[1] Petition for Writ of Certiorari, pp. 25-26. This is obviously an effort to create a constitutional issue in this case.

Upon analysis, it is obvious this contention is meritless. The decision of the Illinois Supreme Court turned on the plaintiffs' failure to comply with the statute of limitations (Ill.Rev.Stat. Ch. 110, §§ 13-202, 13-203), not the fact that they did not file within the probate claim period. The court noted:

> "We first address the issue of whether the complaint against the executors was timely filed. In order for us to find that the second complaint was timely filed, we must find that it related back to the date on which the first complaint was filed. The statute of limitations for personal injuries generally governing actions for personal injuries, set forth in Section 13-202 of the Code of Civil Procedure (Code) (Ill.Rev.Stat. 1987, Ch. 110, par. 13-202), is two years, and the second complaint was filed over two years from the date of injury."

---

[1] There is no such section in the Illinois Revised Statutes. Apparently this is an attempt at citing Illinois Revised Statutes, Ch. 110½, § 18-12, which establishes a six-month deadline for filing claims under the Probate Act.

Vaughn v. *Speaker*, 126 Ill. 150, 533 N.E.2d 885, 127 Ill.Dec. 803, 805.

The court's further discussion concerning the probate claim period is nothing more than dicta expressed in response to the attempt by the plaintiffs to find a statute which could be utilized to salvage their untimely-filed action. The court simply pointed out that none of the cited statutes could be interpreted so as to extend the limitations period.

In Illinois, claims against decedents who are insured can be asserted at any time prior to the expiration of the applicable statute of limitations. *Schloegel* v. *Nardi*, 92 Ill.App.2d 302, 234 N.E.2d 558 (4th Dist. 1968).

Since the record shows that Mr. Speaker was insured by Iowa Mutual Insurance Company at the time of the subject accident, Mr. and Mrs. Vaughn had two years to file their personal injury suit as opposed to being required to do so within the six-month Illinois probate claim period. The defendants have never asserted failure to comply with the probate claim period precludes this action.

The Fourteenth Amendment affords protection against loss of property interests only if the deprivation is via state action. Thus due process considerations are not involved when private parties, such as the defendants in this case, invoke a defense based on a self-executing statute of limitations. This Court has stated:

> "The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state sanctioned private remedies or procedures does not rise to the level of state action.

> See, *e.g. Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Nor is the State's involvement in the mere running of a general statute of limitation generally sufficient to implicate due process. See *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed. 2d 738 (1982). See also *Flagg Bros., Inc. v. Brooks, supra* 436 U.S., at 166, 98 S.Ct. at 1738. . . ."

Tulsa Professional Collection Services v. *Pope*, 108 S.Ct. at 1345.

Tulsa illustrates the difference between the bar of a claim arising under a probate non-claim statute and a statute of limitations, *i.e.* the intimate involvement of the probate court in the former, including the appointment of the personal representative and the filing of the publication notice with the court. In rejecting the argument that probate claim deadlines and statutes of limitations were equivalent for due process purposes, this Court pointed out:

> "It is true that nonclaim statues generally possess some attributes of statutes of limitations. They provide a specific time period within which particular types of claims must be filed and they bar claims presented after expiration of that deadline. . . .
>
> "As we noted in *Short*, however, it is the "self-executing feature" of a statute of limitations that makes *Mullane* and *Mennonite* inapposite. See 454 U.S., at 533, 536, 102 S.Ct., at 794, 796. The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required

> to implicate the protections of the Due Process Clause."

Tulsa Professional Collection Services v. *Pope*, 108 S.Ct. at 1345.

Although they did not mention it, the instant plaintiffs are asking this Court to overrule *Texaco, Inc.* v. *Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed. 2d 738 (1982), wherein the constitutionality of an Indiana statute barring certain claims to mineral interests which had not been used for 20 years was upheld against a due process challenge. In rejecting the argument that the absence of specific notice to them prior to the lapse of a mineral right rendered the self-executory feature of the Indiana statute ineffective, this court noted:

> "That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional."

Texaco, Inc. v. *Short*, 102 S.Ct. at 796.

The fact that the Illinois courts are cognizant of this Court's directive as set forth in *Tulsa Professional Collection Services* and that due process considerations are applicable only in situations involving state action is demonstrated by the case cited by the plaintiffs in their Supplemental Brief herein. An Illinois Appellate Court, dealing with the question of whether a claim was barred because of failure to comply with the probate act claim period, not the statute of limitations, discussed *Tulsa* as follows:

> "In reaching its conclusion, the *Tulsa* Court reasoned that a creditor's claim is considered a property interest protectible by the Due Process Clause, and that the probate court's intimate involvement throughout

the probate proceedings is so pervasive that it must be considered State action."

Rose v. *Kaszynski*, 178 Ill.App.3d 266, 533 N.E.2d 73, 127 Ill.Dec. 455, 457 (1st Dist. 1988).

The result desired by the plaintiffs in this case would result in a substantial, and unwarranted, expansion of the state action concept and thus the Petition for Writ of Certiorari herein should be denied.

B.

THE RULING OF THE ILLINOIS SUPREME COURT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND. THIS COURT HAS STATED THAT IT IS BOUND TO ACCEPT SUCH AN INTERPRETATION OF STATE LAW.

As noted above, *Tulsa Professional Collection Services* and other cases pertaining to the type notice which is given to creditors under probate statutes or laws where the required state action results from judicial involvement in the proceedings are not applicable. Instead of a due process determination, this Court is being asked to review state law matters, being the statute of limitations, whether or not filing a purported suit against a dead man tolls its operation and various statutes pertaining to the relating back of untimely-filed actions.

The ruling of the Illinois Supreme Court which petitioners seek to have reviewed rests on an independent and adequate state ground. When this is the case, a Petition for Writ of Certiorari should be denied. *Wilson* v. *Loew's, Inc.*, 355 U.S. 597, 78 S.Ct. 526 (1958); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct.

2849 (1977). Further, denial of the writ would be in conformance with this Court's holding that it is bound to accept interpretation of state law by the highest court in the state in question. *Coleman* v. *Alabama*, 399 U.S. 1, 90 S.Ct. 1999 (1970).

Whether the statute of limitations should be longer for personal injury claims or whether there should be a procedure for relating back an action against a decedent which is filed prior to the expiration of the limitations period after it expires are matters for the duly elected legislature in Illinois to determine. There are obviously many valid reasons why a statute of limitations should not be undermined simply because of claimed lack of knowledge. But such considerations are immaterial at this stage of the proceeding because, in the absence of a constitution deprivation resulting from state action, it has been held that this Court cannot overturn state legislation. Thus, in *Labine* v. *Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971), rehearing denied 402 U.S. 990, a Louisiana intestate succession statute which precluded illegitimate children, even if they were acknowledged, was held to be a choice which was within the power of the state to make and thus not in contravention of the equal protection and due process clauses.

The fact that this case is one which involves matters appropriately resolved at the state level is another reason that the plaintiffs' Petition for Writ of Certiorari should be denied.

CONCLUSION

Contrary to the argument of the plaintiffs, this case involves private utilization of a self-executing statute of limitations, not claims which were barred by a probate statute. Accordingly, there has been no deprivation of property interests via state action and therefore federal due process considerations are not involved. This personal injury case involves questions of state law which are appropriately dealt with at that level. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. NOE
Attorney for Adeline Speaker and Janet E. Prescott, Co-Executors of the Estate of Wilbur D. Speaker, Deceased, Defendants

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APPENDIX

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT WHITESIDE COUNTY, ILLINOIS GENERAL DIVISION

JANET D. VAUGHN and RICHARD L. VAUGHN, Plaintiffs,	)	No. 85 L 559
vs.	)	
ADELINE SPEAKER and JANET E. PRESCOTT, Co-Executors of the Estate of Wilbur P. Speaker, Defendants.	)	

MOTION TO DISMISS

NOW COMES Adeline Speaker, Co-Executor of the Estate of Wilbur P. Speaker, deceased, defendant, by Bozeman, Neighbour, Patton & Noe, her attorneys, and moves the court, pursuant to Section 2-619 of the Code of Civil Procedure (Ill.Rev.Stat. Ch. 110, §2-619) to dismiss the Complaint herein and in support of said motion states:

1. That it is apparent from the records of this case that this action was not filed within the time permitted by law, i.e. December 2, 1985. Illinois Revised Statutes, Ch. 110 §§ 13-202, 13-203.

2. That the first time this defendant was named was on December 23, 1985 via what was entitled Motion to Correct Misnomer of Defendant. In fact, there was no misnomer since the purported action filed on November 22, 1985 against Wilbur P. Speaker was a nullity in that the said Wilbur P. Speaker was deceased, having died on

January 16, 1985. A certified copy of the Medical Certificate of Death is attached hereto.

ADELINE SPEAKER, Co-Executor
of the Estate of Wilbur P. Speaker,
deceased, Defendant,

By /s/ Robert J. Noe
For: Bozemen, Neighbour, Patton & Noe Her Attorneys

Robert J. Noe, Of Counsel
BOZEMAN, NEIGHBOUR, PATTON & NOE
Fifth Avenue Building
1630 Fifth Avenue
P. O. Box 659
Moline, Illinois 61265
Telephone: (309) 797-0850

*COPY OF DEATH CERTIFICATE OMITTED IN PRINTING.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT WHITESIDE COUNTY, ILLINOIS GENERAL DIVISION

JANET D. VAUGHN and RICHARD L. VAUGHN,	)	
Plaintiffs,	)	No. 85 L 559
vs.	)	
ADELINE SPEAKER and JANET E. PRESCOTT, Co-Executors of the Estate of Wilbur P. Speaker,	)	
Defendants.	)	

O R D E R

The above cause coming on for hearing on the Motion to Dismiss filed by the defendants and the court having considered argument of counsel and briefs submitted by both parties and being fully advised,

It is hereby ORDERED that said motion is allowed and Complaint is dismissed with prejudice. Defendants are awarded costs.

Entered this 2nd day of April, 1986.

/s/ Robert W. Castendyck
Judge

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1791

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JANET D. VAUGHN
and
RICHARD L. VAUGHN,

Petitioners,

vs.

ADELINE SPEAKER
and
JANET E. PRESCOTT,
Co-Executors of
the Estate of
WILBUR P. SPEAKER,

Respondents.

SUPPLEMENTAL BRIEF

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Attorney for Petitioners,
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Richard L. Vaughn.

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In re Estate of Worrell, 92 Ill.2d 412, 65 Ill.Dec. 900, 442 N.E.2d 211 (1982) 2

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and
JANET E. PRESCOTT,
Co-Executors of
the Estate of
WILBUR P. SPEAKER,

Respondents.

SUPPLEMENTAL BRIEF

Petitioners file this Supplemental Brief to their Petition for Writ of Certiorari docketed herein on May 1, 1989, pursuant to Supreme Court Rule 22.6.

Attached in the Appendix is the case of Rose v. Kaszynski, 178 Ill.App.3d 266,

127 Ill.Dec. 455, 533 N.E.2d 73, (1988), rehearing which was denied February 2, 1989. The case has come to the attention of counsel since the filing of our Petition herein. The case applies this Court's holding in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. ___, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), to vitiate the holding of the Illinois Supreme Court in In re Estate of Worrell, 92 Ill.2d 412, 65 Ill.Dec. 900, 442 N.E.2d 211 (1982). In doing so, it notes that the Illinois Probate Act is nearly identical with the Oklahoma Probate Act dealt with in Tulsa.

We contend the Illinois Supreme Court applied the principles of In Worrell in reaching its conclusion in the case at bar. Rose v. Kaszynski illustrates the error of the supreme court in refusing to apply the principles of Tulsa in finding

that petitioner had been deprived of the right of due process under the Fourteenth Amendment as argued in petitioners' apt Petition for Rehearing.

Respectfully submitted,

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REESE & REESE
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815/968-8851

Attorney for Petitioners,
Janet D. Speaker and
Richard L. Vaughn.

A P P E N D I X

Michael H. ROSE, Plaintiff–Appellee,

v.

Mary A. KASZYNSKI, Executor of the Estate of Ben Kaszynski, Deceased, Defendant–Appellant.

No. 88–0061.

Appellate Court of Illinois,
First District, First Division.

Dec. 27, 1988.

Rehearing Denied Feb. 2, 1989.

Appeal was taken from order of the Circuit Court, Cook County, Leonard J. Levin, J., which entered judgment in favor of plaintiff in breach of contract action. The Appellate Court, Buckley, J., held that it would have been a violation of due process to dismiss claim because of failure to give notice of claim against estate of decedent within six months after issuance of letters of office to executor where the executor was the decedent's widow and the underlying action had been pending for five years prior to decedent's death.

Affirmed.

Constitutional Law ⇐308
Executors and Administrators ⇐224

It would deny due process not to permit claim to proceed against decedent's estate because of failure to file the claim with the executor within six months after issuance of letters of office to the executor where the executor was the decedent's widow and the underlying action had been pending for approximately five years prior to the decedent's death. U.S.C.A. Const. Amend. 14; S.H.A. ch. 110½, ¶ 18–12.

Anthony C. Raccuglia & Associates, Peru (James A. McPhedran, of counsel), for defendant-appellant.

Morgan and Karzov, Ltd., Chicago (Arnold J. Karzov, Philip S. Witt, of counsel), for plaintiff-appellee.

Justice BUCKLEY delivered the opinion of the court:

The present appeal arises out of a breach of contract action filed by plaintiff, Michael Rose, against Ben Kaszynski. During the pendency of this action, Ben Kaszynski (decedent) died on March 21, 1984. On April 10, 1984, letters of office in the decedent's estate were issued, and Mary Kaszynski, decedent's wife (defendant), was appointed executor of decedent's estate on the same day. On October 4, 1984, the death of decedent was suggested and spread of record. Defendant was joined as a party to the pending action on February 19, 1985, and approximately one month later, she was served with summons.

On August 5, 1985, defendant moved for involuntary dismissal of the action on the ground that she was not joined as a party within the proper time limitation imposed by section 18–12 of the Probate Act of 1975 (Ill.Rev.Stat.1987, ch. 110½, par. 18–12) (Probate Act). Her motion was denied, and she subsequently filed for reconsideration. That motion was granted, and in the same

order, the trial court dismissed the cause with prejudice. Plaintiff then moved to vacate that order, and upon reconsideration, the court vacated dismissal and reinstated the cause. Plaintiff was ultimately awarded $7,950 plus costs following a trial. Defendant now appeals and we affirm.

Defendant maintains on appeal, as she did in her motion for involuntary dismissal, that section 18–12 of the Probate Act barred plaintiff's action in the present case. Section 18–12 provides in pertinent part as follows:

> "(a) All claims against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, not filed with the representative or the court within 6 months after the entry of the original order directing issuance of letters of office are barred as to all of the decedent's estate, unless notice is not published as provided in subsection (a) of Section 18–3 but is published as provided in subsection (b) of 18–3, in which event all claims not filed within 6 months after the first publica-

> tion date are barred as to all of the decedents' estate * * *."

Defendant reasons that because letters of office were filed on April 10, 1984, and defendant was not joined until February 19, 1985, over 10 months later, plaintiff's claim against her as executor of decedent's estate was untimely.

In support of her position, defendant cites *In re Estate of Worrell* (1982), 92 Ill.2d 412, 65 Ill.Dec. 900, 442 N.E.2d 211. In that case, the plaintiff therein had also filed an action against the decedent prior to her death. The plaintiff, however, did not learn of the death until nine months thereafter. Meanwhile, letters of administration had been issued and publication for claims of creditors was made in accordance with section 18–3 of the Probate Act (Ill.Rev. Stat.1977, ch. 110½, par. 18–3). Nonetheless, the plaintiff failed to file his claim in the probate proceedings or move to substitute the administrator as the party defendant in the underlying action within the six-month period under section 18–12. Ac-

cordingly, our supreme court held that the statute applied to bar the action, reasoning that it is the obligation of the creditor to formally notify the estate representative of his claim even where suit is pending at the decedent's death.

While the *Worrell* decision would appear dispositive of this appeal given that plaintiff was made aware of decedent's death on October 4, 1984, albeit only six days prior to the expiration of six months from the issuance of testamentary letters for decedent's estate, a recent United States Supreme Court decision renders *Worrell* no longer viable, at least under the circumstances of the present case.

In *Tulsa Professional Collection Services, Inc. v. Pope* (1988), — U.S. ——, 108 S.Ct. 1340, 99 L.Ed.2d 565, the Court considered an Oklahoma probate statutory scheme nearly identical to that in Illinois. Under the nonclaim provision of Oklahoma's probate code, creditors' claims against an estate are generally barred unless filed within two months of the publication of notice of the commencement of pro-

bate proceedings.* The Court in *Tulsa* held, however, that mere notice by publication to certain creditors is inadequate for purposes of the Due Process Clause of the fourteenth amendment, thereby reversing the decision of the Oklahoma Supreme Court. Rather, the Court ruled that due process requires " '[n]otice by mail or other means as certain to ensure actual notice' " to all known or reasonably ascertainable creditors of the estate. — U.S. at ——, 108 S.Ct. at 1348, 99 L.Ed.2d at 579, quoting *Mennonite Board of Missions v. Adams* (1983), 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180, 188.

In reaching its conclusion, the *Tulsa* Court reasoned that a creditor's claim is considered a property interest protectible by the Due Process Clause, and that the probate court's intimate involvement throughout the probate proceedings is so pervasive that it must be considered State action. Upon balancing the due process rights of the individual creditor against the State's legitimate interest in the expeditious resolution of the proceedings, the

Court found that it is not so cumbersome to require the creditor's receipt of actual notice, particularly where mail is inexpensive and efficient, and where public notice will suffice for creditors whose identities are not ascertainable by reasonably diligent efforts. Since the Court was unable to glean from the record whether the appellant's identity as a creditor was known or reasonably ascertainable by the appellee, it remanded the cause on this basis.

As in *Tulsa*, defendant here never gave actual notice to the plaintiff in the underlying action. Yet, unlike the Court in *Tulsa*, we find no need to remand the instant cause to the trial court for a determination of whether plaintiff's identity as a creditor of decedent was known or reasonably ascertainable by defendant. Given the fact that defendant is decedent's widow and the underlying action had been pending for approximately five years prior to decedent's death, we believe the above standard has

* The comparable provision in Illinois requires that claims be filed within six months of publi-

been met triggering a violation of plaintiff's due process rights. Therefore, under the mandate of *Tulsa* and the fourteenth amendment of the United States Constitution, we are obliged to uphold the trial court's decision to allow plaintiff's action, notwithstanding our State Supreme Court's decision in *Worrell* to the contrary.

In light of our holding above, we need not address plaintiff's argument regarding section 2–1008(b) of the Code of Civil Procedure (Ill.Rev.Stat.1985, ch. 110, par. 2–1008(b)) which concerns a court's discretionary authority to dismiss a claim if a motion to substitute a party is not filed within 90 days after a decedent's death is suggested of record.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

O'CONNOR and QUINLAN, JJ., concur.